

The ALJ ordered respondent to pay the outstanding charges incurred with Cleveland Clinic and NuMotion, subject to the Kansas Workers Compensation Schedule of Medical

Fees; and to provide the walk-in tub and dietician referral prescribed by Dr. Ashcraft as reasonably necessary medical treatment. Claimant's counsel was awarded a post-award attorney's fee of \$2,250.00, to be paid by respondent and its insurance carrier.

The respondent requests review of whether the ALJ erred in awarding medical services. Respondent argues claimant has failed to prove it is reasonably necessary for him to have a dietician and a walk-in tub to cure and relieve him of the effects of his injury.

Claimant argues the ALJ's Award should be affirmed with regard to ordering respondent to provide the walk-in tub and a referral to a dietician and modified with regard to attorney fees, including awarding an additional 6.5 hours to be paid for time spent on the preparation of this appeal.

The issues on appeal are whether respondent is liable to pay for a walk-in tub to be installed in claimant's home, for treatment from a dietician, and whether claimant's attorney is entitled to additional post-award attorney fees.

FINDINGS OF FACT

This is a post-award matter regarding payment of an unpaid medical bill with Cleveland Clinic; provision of a dietary consultation by a nutritionist; provision of a walk-in tub; payment of prescriptions; reimbursement for payment of a replacement headlight of an authorized scooter; and post-award attorney fees. No testimony was taken at the Post Award hearing on December 11, 2013, but arguments were heard.

Claimant met with personal injury from an accident arising out of and in the course of his employment with respondent on March 12, 2008. The left lower extremity injury ultimately resulted in claimant developing Complex Regional Pain Syndrome (CRPS) in his lower extremities. This matter was settled on July 9, 2009, with claimant's entitlement to future medical treatment left open. A Post-Award Medical Award dated October 10, 2012, authorizes Dr. Scott Ashcraft, the authorized treating physician, to refer claimant to the Cleveland clinic and to a dentist.

Claimant's counsel argues Dr. Ashcraft, the authorized treating physician since August 2008, selected by respondent, is the only physician claimant has been to for his workers compensation claim. Therefore, his recommendation for the tub and for the dietician should be approved.

Respondent's counsel argues that some of the physical issues identified by Dr. Ashcraft could not be linked to any issues with claimant's nutrition and the accident or injuries related to the accident.

In a letter dated October 7, 2013, Dr. Ashcraft clarified his care of claimant and explained his reasoning for the consultations he recommended for claimant. He wrote claimant had exceedingly poor nutrition and has lost a significant amount of weight since

he first met with him. Dr. Ashcraft recommended claimant meet with a dietician to evaluate his caloric intake and to make recommendations to help claimant gain and maintain adequate body weight, and to avoid further problems with weight loss. Dr. Ashcraft also recommended claimant get a walk-in tub to help with his stability issues while he bathes. The doctor wrote that he was afraid if claimant was only showering he would be at risk for falling in the shower and claimant cannot step over a normal tub without significant risk of falling. Finally, Dr. Ashcraft opined claimant is in need of a social services consultation to determine what services he needs and what he is eligible for.

In his October 7, 2013, letter to claimant's attorney, Dr. Ashcraft concluded all of claimant's current problems are a direct relation to his work-related injury and the problems that he has experienced since that injury.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2007 Supp. 44-501(a) states:

(a) If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act. In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2007 Supp. 44-508(g) states:

(g) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.

K.S.A. 2007 Supp. 44-510h(a) states:

(a) It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515 and amendments thereto, as may be reasonably necessary to cure and relieve the employee from the effects of the injury.

K.S.A. 2007 Supp. 44-510k(a) states:

(a) At any time after the entry of an award for compensation, the employee may make application for a hearing, in such form as the director may require for the furnishing of medical treatment. Such post-award hearing shall be held by the assigned administrative law judge, in any county designated by the administrative law judge, and the judge shall conduct the hearing as provided in K.S.A. 44-523 and amendments thereto. The administrative law judge can make an award for further medical care if the administrative law judge finds that the care is necessary to cure or relieve the effects of the accidental injury which was the subject of the underlying award. No post-award benefits shall be ordered without giving all parties to the award the opportunity to present evidence, including taking testimony on any disputed matters. A finding with regard to a disputed issue shall be subject to a full review by the board under subsection (b) of K.S.A. 44-551 and amendments thereto. Any action of the board pursuant to post-award orders shall be subject to review under K.S.A. 44-556 and amendments thereto.

Dr. Ashcraft expressed significant concern regarding claimant's balance issues and the threat of falls while bathing. The recommendation was for a walk-in tub, purely for safety reasons. Claimant's CRPS or Reflex Sympathetic Dystrophy (RSD) as it used to be known, has been described by Dr. Ashcraft as one of the worst cases he has been involved in treating. Claimant's problems affect primarily his lower extremities, with claimant having significant issues walking and standing. Dr. Ashcraft's concerns regarding the safety involved with claimant's shower activities is uncontradicted in this record.

Uncontradicted evidence, which is not improbable or unreasonable, may not be disregarded unless it is shown to be untrustworthy.¹

The Board finds claimant has satisfied his burden of proving the need for the walk-in tub is both necessary and a reasonable request for claimant's ongoing treatment stemming from the CRPS diagnosis. The Order of the ALJ is affirmed on that issue.

Claimant has also requested, and the ALJ ordered, a referral to a dietitian. The Board's initial reaction was to reject this request as claimant's diet was not perceived as being related to the accident and resulting CRPS. However, in an Order dated October 10, 2012, Special Administrative Law Judge Jerry Shelor ordered claimant to be referred to a dentist due to severe tooth decay. Dr. Ashcraft was concerned claimant's heavy use of opiates may be having a detrimental effect on claimant's teeth, leading to significant dental decay.²

¹ *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

² P.A.M. Trans. (Feb. 23, 2012), Cl. Ex. 1.

Dr. Ashcraft's determination that claimant's weight loss problems are a direct relation to his work-related injury and the problems experienced since that injury appear to be connected with claimant's dental issues and weight loss. Whether his concerns prove legitimate is yet to be determined. But, at this time, his opinion is the only one in this record and is not so outlandish as to be rejected at this time. Therefore, the referral to a dietitian by the ALJ is seen as reasonable and necessary at this time.

K.S.A. 44-536(h) Furse 2000 states:

(h) Any and all disputes regarding attorney fees, whether such disputes relate to which of one or more attorneys represents the claimant or claimants or is entitled to the attorney fees, or a division of attorney fees where the claimant or claimants are or have been represented by more than one attorney, or any other disputes concerning attorney fees or contracts for attorney fees, shall be heard and determined by the administrative law judge, after reasonable notice to all interested parties and attorneys.

The statute mandates that claimant's request for additional attorney fees should first be presented to the ALJ for his determination. The Board will not rule on this request at this time.

CONCLUSIONS

After reviewing the record compiled to date, the Board concludes the Post-Award Medical Award should be affirmed as claimant has satisfied his burden of proving both the walk-in tub and the referral to a dietitian stem from problems associated with claimant's work-related accident and resulting injuries and medical problems. The Order of the ALJ is affirmed. Claimant's request for additional attorney fees should be first presented to the ALJ for his determination, pursuant to the mandate of K.S.A. 44-536(h) Furse 2000.

DECISION

WHEREFORE, it is the finding, decision and order of the Board that the Post-Award Medical Award of Administrative Law Judge William G. Belden dated December 13, 2013, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of March, 2014.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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